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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1205

DENNIS A. McGINNIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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DENNIS A. McGINNIS,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DENNIS A. McGINNIS, the Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 28, 1973.

OPINION BELOW

The Opinion of the Court of Appeals appears in the Appendix hereto. A copy of the Order denying the Petition for Rehearing also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on November 28, 1973. A Petition for Rehearing was timely filed and an Order denying the Petition was entered on January 7, 1974. This Petition for a Writ of Certiorari was filed within thirty (30) days of that date. This Court's Jurisdiction is invoked under Title 28 United States Code, Section 1254 (1), through Rule 19 (1) (b), Supreme Court Rules.

QUESTIONS PRESENTED

1. Have petitioner's constitutional rights been violated by a finding that the evidence on record is sufficient to uphold his conviction for aiding and abetting the sale of narcotics when no other Court of Appeals has upheld such a conviction based on a similar quantum of evidence?

2. To what extent can the Tenth Circuit Court of Appeals review its prior decisions and without making any reference thereto, either by overruling or distinguishing case precedent, establish a rule of law in contradiction thereof, without doing violence to the doctrine of stare decisis?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The following portion of the First Amendment to the Constitution of the United States:

> "Congress shall make no law . . . abridging the freedom of speech . . . ."

2. The following portion of the Fifth Amendment to the Constitution of the United States:

> "No persons shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

3. Title 21, United States Code, Section 841 (a)(1):

a) Except as authorized by this Subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to . . . distribute . . . a controlled substance . . .

4. Title 18, United States Code, Section 2:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully caused an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

STATEMENT OF THE CASE

Petitioner was charged in the United States District Court for the District of Colorado in Criminal Case No. 73-CR-19, by a one-count Indictment charging that Defendant did knowingly and intentionally distribute a quantity of 3, 4-methylenedioxy amphetamine (MDA), a Schedule I controlled substance, in violation of Title 21, United States Code, Section 841 (a)(1) and Title 18, United States Code, Section 2. Trial to a jury was held on March 12, 1973, at which time the jury returned a verdict of guilty to the charges, as set forth in Title 21, United States Code, Section 841 (a)(1) and Title 18, United States Code, Section 2. Judgment was entered on this verdict on March 30, 1973, at which time petitioner was sentenced under the Youth Corrections Act, to an indeterminate sentence not to exceed six years. The Notice of Appeal was filed on April 3, 1973. Thereafter petitioner was released on April 12, 1973, after posting an Appearance Bond on Appeal in the sum of $20,000.00.

The events which led to the Indictment, as presented by the evidence, are as follows. On January 3, 1973, a paid informer for the Bureau of Narcotic and Dangerous Drugs arranged a meeting between special agents of the Bureau and two co-defendants in this case, Dennis Stockert and Jerome Bauer, for the purpose of purchasing from said co-defendants approximately two pounds of MDA (T. 15, 16, 25, 26, 27). The special agents and the informer met Dennis Stockert at 1641 Washington Street, Denver, Colorado, whereupon approximately $8,200 was displayed to him to show that the agents had sufficient monies to consummate the purchase. (T. 16, 17, 27). The parties then proceeded to the White Spot Restaurant at 601 East Colfax Avenue, Denver, Colorado, where they met with the second co-defendant, Jerome Bauer (T. 16). The agents, the informer and the two co-defendants then went to a Jack-In-The-Box Restaurant on East Colfax Avenue, where the agents were purportedly informed by Jerome Bauer, according to the testimony of Agent Lamberson, that they "would have to meet with his partner, his partner had the M.D.A., and he said we could go to this apartment, it was there, or we could rent a motel room and he would have it delivered there." (T. 18). The agents chose the apartment at which to carry out the transaction (T. 18, 19).

Upon arriving at the apartment, the two special agents and Bauer entered the apartment while Stockert and the informer remained outside (T. 19, 20). Entering the apartment, it was discovered that petitioner was alone inside, putting on his shoes (T. 20, 31). A short conversation followed between Bauer and petitioner concerning petitioner's shoes (T. 31) and thereafter, Jerome Bauer produced a large brown grocery sack containing approximately two pounds of MDA from the kitchen and put it on the dining room table (T. 20, 21, 33). Bauer then asked the petitioner where the scales were (T. 22, 33, 34). Petitioner indicated their location to him, and Bauer then produced a set of triple beam balance Oharus scales and placed them on the table (T. 22, 34, 35). Bauer was unable to make the scales balance and asked the petitioner if he would do so. Petitioner then proceeded to adjust the scales (T. 22, 37).

After this was done, Agent Lamberson started weighing the small bags of MDA (T. 22, 39). Petitioner stated that they would weigh 29 1/2 grams, and they did (T. 22, 23). While the bags were being weighed, Stockert entered the apartment, went to the window and acted as a lookout (T. 23). At this point, Bauer was asking Agent Castillo where the money was (T. 23, 29, 40). While all of this was transacting, petitioner was walking about the apartment admiring and trying out the new shoes he had recently purchased (T. 35, 37). The only times he stopped his walking about was when Bauer asked him to set the scales. After Special Agent Lamberson weighed approximately eight of the small bags, all parties were arrested (T. 23, 24).

Petitioner's defense was that he was only a bystander and was in the apartment due solely to the fact that he was visiting friends that occupied the same. The apartment was leased by one Trudy Walker and her co-occupant was one Timothy Fry (T. 29). Petitioner asserts that the transaction was between the Bureau of Narcotic and Dangerous Drugs and the two co-defendants, Jerome Bauer and Dennis Stockert, both of whom subsequently pled guilty to these charges, and that petitioner was neither a principal nor an aider and abetter of this illegal transaction (T. 48, 54).

REASONS FOR GRANTING THE WRIT

Petitioner contends that the evidence on record is insufficient to sustain this conviction for aiding and abetting (Title 18, United States Code, Section 2) a sale of narcotics (Title 28, United States Code, Section 841 (a)(1)). This contention is based on the fact that the standard test of evidence necessary to uphold such a conviction, as determined by precedent in the Tenth Circuit as well as other Circuits, is greater in both quality and quantity than the evidence on record against petitioner in the instant case. To uphold petitioner's conviction in light of this fact is to deprive him of his constitutional right to freedom of association, a corollary to the First Amendment guarantee to freedom of speech, and his Fifth Amendment right to due process of law. The following two arguments support the contention.

1. *The decision in the instant case creates a conflict between the Tenth Circuit and the other circuits.*

The United States Supreme Court, *Nye & Nissen* v. *United States*, 336 U.S. 613, at 619, 69 S.Ct. 766, at 769-770, 93 L. Ed. 919 (1949), has provided:

> In order to aid and abet another to commit a crime it is necessary that a defendant "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed." L. Hand, J., in *United States* v. *Peoni*, 100 F.2d 401, 402.

The issue concerns applications of this test to varying fact patterns by Courts of Appeals and a comparison of those fact patterns with the factual evidence against petitioner.

The Ninth Circuit Court of Appeals, *United States* v. *Camarillo*, 431 F.2d 616 (9th Cir. 1970) (conviction for aiding and abetting a sale of narcotics), held that the evidence was insufficient where it showed that the defendant, present with knowledge: Told an agent that future transactions would be done more quickly and promptly; when asked about the quality of the heroin, stated that it had been cut three times and was of medium quality; volunteered that better quality could be purchased at a higher price; volunteered that large amounts of cocaine could be supplied as well; and volunteered further he and his co-defendant received large amounts of heroin periodically from Mexico. The Court applied the test quoted *supra*, requiring all three elements – association, participation and a desire to make it succeed, and held that there was no evidence that the defendant had participated in the actual facilitation of the sale itself. The same Court in a later case, *United States* v. *Fully*, 452 F.2d 1012 (9th Cir. 1972), held that the evidence was sufficient where the evidence indicated that the defendant had praised the quality of the cocaine, discussed the origin and history of that particular cocaine, and stated that he had been in the business for several months. One distinguishing factor is that Fully's activities

displayed more than general knowledge and were actually categorized as vigorous salesmanship. This was coupled with his direct statement about being "in the business." The evidence in the instant case is of a lesser quantum than that in *Camarillo*, with respect to the element of association with the venture and the element of participation in facilitating the sale itself. Under the doctrine of stare decisis, petitioner's conviction would not have been upheld by the Ninth Circuit Court of Appeals.

The Third Circuit, *United States* v. *Pratt*, 429 F.2d 690 (3rd Cir. 1970) (conviction for aiding and abetting a sale of heroin reversed), held that the evidence was insufficient to uphold the conviction where the defendant had (1) conversed with his co-defendant on the street just prior to the sale, then (2) looked in through a windshield at the officer who made the purchase in his car, (3) went back and spoke to co-defendant again, and (4) got into the back seat of the officers car while co-defendant got into the front seat and made the sale. The Court held that despite the defendant's presence, knowledge and association with the principal there was no evidence of his association with the venture itself nor of a criminal intent, and to find him guilty would "deprive him of due process of law; to find him guilty by association." In a subsequent case, *United States* v. *Austin*, 459 F.2d 315 (3rd Cir. 1972) the same Court upheld a conviction because, although the defendant was not present when the narcotics and money were exchanged, he later told an agent that he had to give them less than agreed because "I couldn't let my boys starve." This is the type of overt association, just as was found in *Fully*, *supra*, which the courts require to allow the reasonable inference of collaboration. In the instant case the evidence contains no such overt association with the venture itself. Petitioner's most overt action was his volunteering what the weight of each baggie of MDA would weigh. This is only a display of general knowledge and not an association with this particular venture itself. Under the doctrine of stare decisis petitioner's conviction would not have been upheld by the Third Circuit Court of Appeals.

United States v. *Duff*, 332 F.2d 702 (6th Cir. 1964), represents a holding by the Sixth Circuit Court of Appeals

that the defendant's acts were insufficient to sustain an aiding and abetting conviction. Facts: The illegal sale was made in her apartment, which her co-defendant had shared with her for a year; the telephone was in her name; when the agent called, she answered the phone; when he arrived, she opened the door; co-defendant had told the agent that he could deal with her in the future. The Court found that the defendant's actions were on the periphery of the transaction and stemmed from her mere presence. The co-defendant's statement implicating the defendant in future deals was given no weight by the Court because it was not an act of association by the defendant. Putting aside the co-defendant's inculpatory statement, there was no overt act of association with the venture. Applying the same test to the evidence in the instant case, the Sixth Circuit Court of Appeals would reverse petitioner's conviction for the same reasons it reversed the conviction in *Duff*.

The other Circuits have upheld convictions for aiding and abetting a sale of narcotics only where the quantum of evidence has been greater than that in the instant case. In *United States* v. *Moody*, 462 F.2d 1307 (8th Cir. 1972), the evidence indicated that at the time of sale the principal, balking because he did not know the agent, talked to the defendant then gave her a tin foil packet, which she took across the room to the agent, receiving $60.00 in return. The defendant claimed lack of knowledge, but the Court held that it could be inferred beyond a reasonable doubt. The defendant was an instrumentality of the principal and not only could a desire to make the sale succeed but also a facilitation of the sale and an association with the venture be directly inferred from her acts. Petitioner was not an instrumentality, but acted independently.

The Fifth Circuit Court of Appeals, *United States* v. *Howard*, 451 F.2d 1003 (5th Cir. 1971), determined that the evidence was sufficient where it showed that the defendant had: 1) counted out the LSD tabs, 2) counted out the money, and 3) discussed the use of the money with a co-defendant. Similarly, in *United States* v. *Clayton*, 450 F.2d 16 (1st Cir. 1971) (conviction for sale of LSD and conspiracy to import hashish, affirmed), *cert. denied* 405 U.S. 1044, the First Circuit

Court of Appeals held that the evidence was sufficient where it indicated that the defendant had stated that he lived in Tangier and "had unlimited supply of hash that could be smuggled into the U.S.," and discussed the specifics of the operation which culminated in the present sale. These holdings in the Fifth and First Circuits indicate the pattern of overt statements or acts of association with a specific venture which are a condition precedent to a finding of criminal intent and the resultant finding of sufficiency of evidence.

The Second Circuit Court of Appeals held in its leading case that the evidence was "substantial and purposive enough" when it showed that the defendant 1) arranged the sale, 2) participated in the preliminary discussion, 3) collected and handled the money, and 4) received $500.00 for his efforts. *United States* v. *Santore*, 290 F.2d 51 (2nd Cir. 1960), *cert. denied* 365 U.S. 834, 81 S.Ct. 745. Again, overt activities indicated an association with the venture and participation as a facilitator, in addition to a desire to make the sale succeed. These are the minimum indices of conduct which are required under the *Nye & Nissen* test, quoted *supra*.

The Seventh Circuit Court of Appeals found the evidence sufficient in *United States* v. *Maroy*, 248 F.2d 663 (7th Cir. 1957). The evidence there indicated that the principal worked for the defendant, the principal made illegal sales of heroin, when the agents told the defendant they wanted to buy he directed them to the principal by saying "see my man", the principal drove the defendant's car to and from the transaction, the defendant was close by and met with the principal before and right after the sales. Here again there was an overt association with the venture by the defendant's telling the agents to "see my man" in regard to a sale of illegal narcotics.

Petitioner contends that in each of these Circuits the quantum of evidence necessary to sustain a conviction for aiding and abetting a sale of narcotics, as determined by prior case law, could not allow a finding of sufficient evidence in the instant case. The actions of the petitioner provide no indication of a criminal intent on his part. His actions consisted solely of a display of general knowledge. The record discloses no evidence that petitioner handled the narcotics or their

container. Nor is there any evidence that he even knew where they were located in the apartment. The government agent testified that the Oharus scale was of a fairly common type used for "general purposes" which he himself could have set (T. p. 36-37). To say that petitioner's knowledge of the location and operation of a multi-purpose scale, which he made known only upon being asked, incriminates him is to put petitioner in a position where he is forced to prove the innocence of his own actions, which were neither inculpatory nor exculpatory.

The reference by the co-defendant to his "partner" clearly cannot be used as evidence to establish that petitioner "associated himself" with that co-defendant's unlawful venture. The one piece of substantive evidence against petitioner is, as mentioned *supra*, his voluntary statement that the weight of each baggie of amphetamines would be 29 1/2 grams, which it was. However, this knowledge is only of a general nature in light of the agent's testimony that a baggie weighing 29 1/2 grams was "a fairly common way that this item is packaged" (T. p. 38). This one piece of evidence is hardly an overt indication of criminal intent. The lack of evidence of petitioner associating himself with the venture of participating in it as a facilitator is logical when coupled with the evidence on record that his primary concern at the time of sale was the appearance of his new shoes. This negates any suggestion of criminal involvement the record contains.

To uphold petitioner's conviction would mean that certain acts are felonious in the Tenth Circuit which acts would carry no criminal liability in eight other Circuits. Petitioner has been found guilty by his personal association with the principal, and that finding contravenes his constitutional right to due process of law and infringes upon his freedom of speech and association.

2. *The doctrine of stare decisis has been violated by the Tenth Circuit Court of Appeals.*

Stare decisis was explained by the Court in *Perkins* v. *Clements*, 1 Pat. & H. 141, 153-154 (Va. 1855), as follows:

> When the law is plainly or intelligibly written, or expounded and settled by competent judicial author-

> ity, and not repugnant to the fundamental law, I always yield a willing obedience to . . . stare decisis, without the observance of which the law is divested of one of its most important attributes, becomes fluctuating and capricious, and instead of being a steady light to guide, or shield to protect, becomes an *iguis fatuus* to mislead, or a snare to entrap the citizen.

In the case of *Gee's Adm'r* v. *Williamson*, 1 Porter 313, 27 Amer. Dec. 628, 632 (Alab. 1835), the Court quoted from 1 Kent. Com. 475, 476, as follows:

> A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case.

The Tenth Circuit Court of Appeals applied the *Nye & Nissen* test for aiding and abetting in *King* v. *United States*, 402 F.2d 289 (10th Cir. 1968) (forgery), wherein the Court held that all three of the elements, association with the venture, participation as a facilitator, and a desire that it succeed, must be evidenced. Subsequently, in *United States* v. *Priest*, 419 F.2d 570 (10th Cir. 1970), the Court found the evidence sufficient to uphold the conviction for aiding and abetting a sale of narcotics where it indicated that the defendant had: 1) met with his co-defendant and an agent in a lounge, wherein the defendant 2) acted as the salesman, claiming a superior quality drug and explaining the relation of the harvesting process to the price and quality, and 3) advised of the location of the sale. This holding, based on the defendant's overt connections to the drug transaction, is consistent with the precedent in the other Circuits as discussed *supra*.

In *United States* v. *Hayes*, 477 F.2d 868 (10th Cir. 1973) (found guilty of an LSD sale, upheld), an instruction given to the jury on aiding and abetting was challenged as reversible

error. The Court quoted the *Nye & Nissen* test and held that the instruction was not error in light of the evidence that the defendant had: 1) spoken of the good quality, "they better be good or I'll be back"; 2) taken the money from the buyer; and 3) indicated that future deals were possible. The defendant's threat/guarantee constituted an association with the venture, his taking of money indicated a facilitation of the sale and his indication of future deals constituted an expression of desire that the transaction succeed. Classically, all three elements of the test were met through overt actions by the defendant.

The evidence in the instant case does not indicate a desire that the transaction succeed, there was no association with the venture by petitioner, nor was there participation as a facilitator. The sale was going to happen whether petitioner was there or not. His actions were peripheral to the transaction that was taking place. Finding the evidence in the instant case sufficient to sustain the conviction ignores the herein cited cases and establishes a different standard of conduct. This was done without either distinguishing or overruling prior cases. Indeed, *King, supra,* was cited by the Court of Appeals only for the proposition that "presence coupled with other acts of a party may combine to support a guilty verdict." Opinion of the Court, p. 17 (See Appendix). The Court did not address itself to what the "other acts" need be, while the issue actually turns on the nature and character of those acts.

Commenting on the ever present struggle to attain neutrality in the law, the author of a recent law review article discussing the relationship of Professor Wechsler's Neutral Principles of Law to the doctrine of stare decisis, noted that, "[P]recedent in the law permits adjudication with, at most, minimal recourse to value choices." Birmingham, Robert L., "The Neutrality of Adherence to Precedent," 1971 *Duke L. J.* 541, 553. The suppression of personal values by a ruling judge is most difficult in a case involving the selling of dangerous narcotics, an activity abhorrent to most citizens and one to be ferreted out and stopped. The danger is that one's personal vehemence against these activities will be transferred to an individual defendant associated only personally with another individual who is selling the drugs. Such a reaction could result in finding a defendant guilty for his personal association with the seller.

This is a danger protected against by adherence to precedent. Legal philosopher Gilbert Radbruch stated that:

> ... [L]egal rules are essentially a course of salience; the continuity which the law supplies through assured application of settled principles is both the foundation of its neutrality and its most significant contribution to the well-being of society. *Id.*

It has been noted that judges can avoid precedent by distinguishing prior cases, but this requires confrontation with precedent and involves a rational comparison which diminishes the role personal values play in judicial decision-making. Stone, Julius, "A Court of Appeal in Search of Itself: Thoughts on Judges' Liberation," 71 *Columbia L. R.* 1920. In the instant case petitioner did not receive the benefit of a rational application of precedent.

It is said that precedent is of little value because each case turns so closely on its specific fact situation, and the same pattern rarely appears twice. But patterns of fact can be established and "simple rules can often be used to predict the outcome of a new case from an old case," even though specific facts vary. Lawlor, Reed C., "Axioms of Fact Polarization and Fact Ranking – Their Role in Stare Decisis," 14 *Vill. L. R.* 703, 705 (1969). *See also* Lawlor, Reed C., "Personal Stare Decisis," 41 *So. Cal. L. R.* 73 (1969). The case analysis herein, *supra*, indicates how fact patterns can be put on a continuum and compared qualitatively and quantitatively. It is in this light that precedent is binding and stare decisis must be followed to protect a defendant's right to due process of law.

The Court of Appeals' opinion in the instant case establishes a lesser quantum of evidence as being necessary to sustain a conviction for aiding and abetting a sale of narcotics than that established by precedent. In doing so the Court did not abide by the judicial doctrine of stare decisis, but rather acted by judicial *fiat*. The matter has been further confused by the determination not to publish the Opinion in this case.

Petitioner's right to due process has been violated by the Court's failure to rely on precedent or, in the alternative, to

explain its holding in light of that prior case law. Stare decisis operates to establish orderly law governing People's activity. "[I]t is necessary to preserve the certainty, the stability and the symmetry of our jurisprudence." *Menge* v. *The Madrid*, 40 F. 677, 679 (Cir. Ct. Louis, 1889). *Query:* What is the present law in the Tenth Circuit on the quantum of evidence sufficient to sustain a conviction for aiding and abetting a narcotics sale? This question must be answered to protect the right of the People to freedom of association and due process of law. The unknown consequences of the decision in the instant case, made without benefit of stare decisis, jeopardize the constitutional rights of citizens who might, by their activities, bring themselves into the jurisdictional reach of the Tenth Circuit judicial system wherein their personal activities might subject them to criminal liability to which they would not be subject in any other jurisdiction.

CONCLUSION

It is therefore respectfully prayed that this Honorable Court grant this Petition for issuance of a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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BY: _____

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APPENDIX
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NOVEMBER TERM – 1973

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
v.	)	No. 73-1339
DENNIS A. McGINNIS, *Defendant-Appellant.*	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(No. 73-CR-19)

J. Terry Wiggins, Assistant U. S. Attorney, Denver, Colorado, (James L. Treece, U. S. Attorney, Denver, Colorado with him on the brief), for Plaintiff-Appellee.

Dennis R. Wanifuchi, Denver, Colorado, for Defendant-Appellant.

Before PICKETT, SETH and DOYLE, Circuit Judges.

PICKETT, Circuit Judge.

McGinnis appeals from his conviction for aiding and abetting in the distribution of a controlled substance, 3-4 methylenedioxy amphetamine (a narcotic, commonly known as MDA) in violation of 21 U.S.C. §841(a)(1) (1970) and 18 U.S.C. §2 (1970). He was given a six-year indeterminate sentence under the Youth Corrections Act, 18 U.S.C. §5010(b) (1970). Two codefendants in the case, Dennis Stockert and Jerome Bauer, entered guilty pleas.

In January 1973 a government informer arranged a meeting between Bauer, Stockert and undercover federal narcotics agents, Lamberson and Castillo, at the White Spot Restaurant on East Colfax in Denver, Colorado. Desiring a less public place for a narcotics transaction, Bauer suggested that the parties go to a Jack-In-The-Box drive-in restaurant where the agents displayed, as evidence of their good faith in the transaction, a roll of bills supposedly containing $9,000. Agent Lamberson testified that Bauer then told him that his "partner" had the MDA and was in an apartment on Cook Street where they could consummate the deal. When the parties arrived at the Cook Street apartment McGinnis was there alone, and was introduced to the agents by Bauer.[1] When agent Castillo asked where the narcotics were, Bauer stated, "We'll get the stuff." He and McGinnis then went into the kitchen and when they returned Bauer was carrying a brown grocery sack containing thirty-two baggies of MDA. In response to an inquiry by Bauer concerning the location of the scales to check the weight of the baggies, McGinnis, with a hand gesture, stated that "they are right in there." When Bauer had trouble adjusting the scales for weighing, McGinnis made the proper adjustment. As agent Lamberson began weighing the individual baggies, McGinnis stated that each bag would weigh twenty-nine and one-half grams (approximately one ounce). Upon weighing several bags Lamberson found that each one did weigh exactly twenty-nine and one-half grams. Shortly after the weighing, Stockert, Bauer and McGinnis were placed under arrest.

The issues on this appeal arise out of a challenge of the sufficiency of the evidence to support the verdict. McGinnis

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[1]The apartment was leased to Trudy Walker, but she was not implicated with Bauer or McGinnis so far as this record shows.

contends that the evidence showed only that he was in the apartment where the drug transaction occurred and that there is no evidence that he actively participated in consummating the deal or possessed the drugs. He argues that his knowledge of the location of the scales was not incriminating and urges that his statement that the baggies would weigh twenty-nine and one-half grams was consistent with innocence since that weight was standard in such drug transactions. There was testimony, however, that a baggie weighing anywhere from twenty-eight to thirty grams was acceptable as an ounce in drug transactions.

The possession required for conviction under this statute may be either actual or constructive, exclusive or joint. Mason v. United States, 408 F.2d 903 (10th Cir. 1969), *cert. denied*, 400 U.S. 993 (1971); United States v. Davis, 461 F.2d 1026 (3d Cir. 1972); Riley v. United States, 411 F.2d 1146 (9th Cir. 1969), *cert. denied*, 397 U.S. 906 (1970). Although mere presence in a room where a drug transaction occurs is insufficient for conviction as an aider and abettor, United States v. Tijerian, 446 F.2d 675 (10th Cir. 1971); United States v. Hill, 464 F.2d 1287 (8th Cir. 1972), such presence coupled with other acts of a party may combine to support a guilty verdict. King v. United States, 402 F.2d 289 (10th Cir. 1968); United States v. Ragland, 375 F.2d 471 (2d Cir. 1967), *cert. denied*, 390 U.S. 975 (1968). The agents went to the apartment with Bauer and Stockert expecting to find a partner to complete the purchase of a large quantity of narcotics. When they arrived McGinnis was there alone and there is no indication that he was not expecting them. Although McGinnis did not actually handle the drugs in the presence of the agents, he knew where they were in the apartment and went with Bauer to obtain them to complete the sale. He knew where scales suitable for weighing such material could be found. He knew how to adjust the scales for this purpose. He knew the exact weight content of each baggie. Circumstantial evidence may be given the same weight as direct evidence and it need not conclusively exclude every other hypothesis except guilt. United States v. Henry, 468 F.2d 892 (10th Cir. 1972); Barton v. United States, 407 F.2d 1155 (10th Cir. 1969). On appeal, the evidence must be considered in the light most favorable

to the winning side. Glasser v. United States, 315 U.S. 60 (1942); United States v. Floyd, 477 F.2d 217 (10th Cir. 1973), *petition for cert. filed,* 42 U.S.L.W. 3075 (U.S. July 30, 1973) (No. 73-205); United States v. Spoonhunter, 476 F.2d 1050 (10th Cir. 1973). Considered in this light, we find substantial evidence in the record to establish that McGinnis associated himself with the unlawful venture.

AFFIRMED.

APPENDIX
ORDER DENYING THE PETITION FOR A REHEARING

JANUARY TERM – JANUARY 7, 1974

Before Honorable John C. Pickett, Senior Circuit Judge, Honorable Oliver Seth and Honorable William E. Doyle, Circuit Judges.

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 73-1339
	)	
DENNIS A. McGINNIS,	)	
	)	
Defendant-Appellant.	)	

This matter comes on for consideration of the petition for rehearing filed by the Appellant.

Upon consideration whereof, the petition for rehearing is denied.

/s/

HOWARD K. PHILLIPS,
Clerk